No. 26-2469

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, ET AL.,
Appellants,

v.

ANTHONY ALBENCE, ET AL.,
Appellees,

On Appeal from the United States District Court
for the District of Delaware
No. 1:26-cv-00445-JLH
The Honorable Jennifer L. Hall

Brief for Appellees

Tara Malloy
Megan McAllen
David Kolker
Elizabeth Shimek*
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200
tmalloy@campaignlegalcenter.org
mmcallen@campaignlegalcenter.org
dkolker@campaignlegalcenter.org
eshimek@campaignlegalcenter.org

**Application for admission pending*

Emily V. Burton
DELAWARE DEPARTMENT OF JUSTICE
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-5374
Emily.burton@delaware.gov

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Codes

Other Authorities

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The district court denied appellants' motion for preliminary injunction on June 8, 2026. JA-01. Appellants filed a notice of appeal on June 10, 2026. JA-03. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Whether the district court was correct to hold that the Delaware Elections Disclosure Act ("Act"), which requires groups to disclose information about the financing of their "electioneering communications" distributed shortly before an election, was likely constitutional on its face. JA-009-010

2. Whether the district court was correct to hold that appellants Americans for Prosperity ("AFP") and Americans for Prosperity Foundation ("AFPF") were unlikely to succeed on their as-applied claim because they failed to allege facts showing that their donors faced a reasonable probability of harassment or reprisals if their identities were disclosed under the Act. JA-011-013.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not come before this Court previously. This Court previously considered and rejected a First Amendment challenge to the Act in *Delaware Strong Families v. Delaware Attorney General*, 793 F.3d 304 (3d Cir. 2015) ("*DSF*").

INTRODUCTION

Appellants' attempt to relitigate the constitutionality of the Act's disclosure provisions is an exercise in willful blindness.

First, appellants ask this Court to disregard its own controlling decision in *DSF* on grounds that it has been "superseded" by *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), Appellants' Opening Br. 3-4 ("AOB"). To do so, however, appellants elide *DSF*'s explicit application of the exacting scrutiny standard prescribed by *Bonta* and overlook *DSF*'s finding that the Act was "narrowly tailored" to achieve the government's important informational interest in electoral transparency. *DSF*, 793 F.3d at 306. *Bonta* did not cast doubt on *DSF* but rather reaffirmed this precedent.

Second, appellants also ask this Court to disregard the Supreme Court's precedents in this area. Appellants fail to mention that the Supreme Court has twice upheld the federal electioneering communications ("EC") disclosure law on which Delaware's Act (the "Act") was purposely modeled. *McConnell v. FEC*, 540 U.S. 93, 194-97 (2003); *Citizens United v. FEC*, 558 U.S. 310, 366-71 (2010). The EC provisions in the Act copy much of federal law almost verbatim. *Compare* 15 Del. C. §§ 8002(10), (27), 8031(a)(3) *with* 52 U.S.C. § 30104(f)(3). Given the close similarity of the laws, appellants have no answer for why these Supreme Court decisions should not guide the review of Delaware's Act as well.

Third, appellants distort the reporting requirements of the Act, turning a blind eye to the options available for an advertiser to tailor the scope of the donors they disclose. Delaware law allows groups to register a political action committee ("PAC"), 15 Del. C. § 8002(18), or form an unincorporated association to finance their ECs. In either case, only the donors to this PAC or association need be disclosed. Appellants' chief objection to the Act is that it supposedly requires "staggeringly overbroad donor disclosure," AOB 1, but this objection depends on willful blindness to the legally permitted alternatives.

Finally, appellants ignore that this Court's sister Circuits have upheld political disclosure laws similar to Delaware's Act and, in some cases, far more extensive reporting regimes. *See infra* at 36-38. No court has limited the permissible scope of electoral disclosure in the manner that appellants demand here: namely, to cover only those donors who expressly earmark their money for particular election ads. And as recently as one month ago, the Supreme Court reaffirmed that "disclosure often represents a less restrictive alternative" to other campaign finance laws for "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Nat'l Republican Senatorial Comm. v. FEC*, No. 24-621, 2026 WL 1868932, at *10 (U.S. June 30, 2026) *("NRSC")* (internal quotations and citation omitted). Delaware's Act is an important, narrowly tailored measure to ensure that "the electorate [has] information as to where political campaign money comes from and how it is spent" so that voters can "evaluat[e] those who seek [public] office." *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (citation modified). For a second time, this Court should uphold it.

STATEMENT OF THE CASE

A. Delaware Elections Disclosure Act

1. Federal Backdrop

In designing the Act, the Delaware Legislature looked to enactment of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, in 2002. Prior to BCRA, the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101, *et seq.*, had been narrowed by a series of court decisions to require disclosure of only those ads that "expressly advocated" for or against candidates, an easily evaded standard that allowed the funders of most federal election-related advertising to remain secret. *See Buckley*, 424 U.S. at 41-43. *See also id.* at 44 n.52 (explaining that "express advocacy" included words "such as 'vote for,' 'elect,' 'support,' . . ."). By avoiding "magic words" of express advocacy, organizations could spend hundreds of millions of dollars on so-called "issue speech" "without disclosing the identity of, or any other information about, their sponsors." *McConnell*, 540 U.S. at 126.

In BCRA, Congress "coin[ed] a new term, 'electioneering communications,' to replace the narrowing [express advocacy] construction of FECA's disclosure provisions," *id.* at 189, and extended federal reporting and disclaimer requirements to cover this new category of spending. Electioneering communications were defined by reference to "easily understood and objectively determinable" criteria, *id.* at 103, *i.e.*, ads that (1) "refer[] to a clearly identified candidate for Federal office," (2) are made within 60 days of a general election or 30 days of a primary, and (3) are "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3).

The Supreme Court upheld BCRA's disclosure provisions on their face in *McConnell*, 540 U.S. at 196-97, and as applied in *Citizens United*, 558 U.S. at 369. *See also Indep. Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court), *summarily aff'd*, 137 S. Ct. 1204 (2017). Both decisions held that the federal EC disclosure law satisfied exacting scrutiny because it was tailored to advance the important "informational interest" in ensuring voters "know[] who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. Neither case expressed any concern as to the donor disclosure required by BRCA.

In upholding BCRA, the Supreme Court necessarily approved its requirement that covered groups that use their general fund to fund ECs must disclose "the names and addresses of *all* contributors" over the monetary threshold. 52 U.S.C. § 30104(f)(2)(F) (emphasis added). If a group creates a segregated bank account to finance its ECs and limits EC spending to funds contributed "directly to this account," it may report only contributors to that account. *Id.* § 30104(f)(2)(E). The

Court emphasized that this donor disclosure was crucial to achieving the government's informational interest because absent this reporting, "sponsors of [election] ads often used misleading names to conceal their identity." *McConnell*, 540 U.S. at 128.

Four years after *McConnell*, the FEC adopted a regulation permitting corporations and unions funding ECs to disclose only those donors who contributed "for the purpose of furthering electioneering communications." *See* 11 C.F.R. § 104.20(c)(10); 72 Fed. Reg. 72899 (Dec. 26, 2007). Appellants suggest that federal law is thus "administered" under an earmarking limitation, AOB 34, but this limitation does not appear in the statute, and was only added by regulation in 2007 as to certain spenders.

Because the FEC's earmarking rule is easily evaded, disclosure of federal ECs plummeted after its adoption.[1] This prompted then-Congressman Chris Van Hollen to file suit under the Administrative Procedure Act ("APA") to challenge the FEC's regulation as arbitrary, capricious, and contrary to the statute. The rule was ultimately upheld as a permissible interpretation of federal law under *Chevron*

---

[1] Following enactment of the FEC rule, the percentage of filing groups that disclosed their donors dropped from 71 percent in 2004 to only 15 percent in 2010. T.W. Farnam, *Disclosure of 'issue ad' funding is on the wane*, Wash. Post (Sep. 15, 2010), https://www.washingtonpost.com/archive/national/2010/09/16/disclosure-of-issue-ad-funding-is-on-the-wane/ed96f290-c132-11df-ba42-2bac54a6afdd/?_pml=1.

deference,[2] but the courts in no way suggested that this earmarking rule was constitutionally compelled. *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016).

2. History of the Delaware Act

Before 2013, Delaware law also required disclosure only as to ads that "expressly advocate[d]" a candidate's nomination or election. 15 Del. C. §§ 8002(10), 8030, 8031 (2012). As in the federal system prior to BCRA, groups avoided disclosure by simply crafting messages that avoided the "magic words" of express advocacy. Consequently, the Delaware Legislature voiced similar concerns about "a proliferation of advertisements that [we]re distributed during the campaign season and [were] intended to influence elections, but [we]re not required to be reported under existing law." H.B. 300, 146th Gen. Assemb., pmbl. (Del. 2012). Legislators heard testimony about the problem of anonymous campaign ads, including, for example, descriptions of 2010 mailings by groups that hid their donors that attacked various state legislative candidates for their stances on taxes, JA-144, and similar anonymous mailings in school board elections, JA-101.

Following the federal model, the Legislature in 2013 extended existing Delaware disclosure requirements to encompass "electioneering communications." *See* 15 Del. C. §§ 8002(10), (27), 8031(a)(3). Guided by the analysis in *McConnell*

[2] Given that *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), overruled the *Chevron* doctrine, the FEC rule may no longer survive APA review.

and *Citizens United*, the Act defines covered "electioneering communications" by the same "easily understood and objectively determinable" criteria employed by BCRA, *McConnell*, 540 U.S. at 103, covering ads that: "[r]efer[] to a clearly identified candidate;" and are "publicly distributed" within 30 days of primary election or 60 days of a general election; "to an audience that includes members of the electorate for the office sought by such candidate." 15 Del. C. § 8002(10).[3] These changes, the Legislature explained, would enable Delaware "voters to evaluate and measure the statements made by and interests of . . . third parties in a manner that is prompt and informative." H.B. 300, pmbl.

Soon after enactment, the Act was challenged by Delaware Strong Families as overbroad and contrary to the First Amendment. The district court granted DSF's motion for preliminary injunction, principally on grounds that the Act was insufficiently tailored because it reached "neutral communication[s]" and "neutral communicator[s]." *DSF v. Biden*, 34 F. Supp. 3d 381, 395 (D. Del. 2014).

Delaware appealed, and this Court reversed and upheld the Act. This Court determined that exacting scrutiny applied and held that the governmental interest in "provid[ing] the electorate with information as to where political campaign money comes from" was "sufficiently important" to sustain a disclosure law. *DSF*, 793 F.3d

[3] *Citizens United*'s approval of similar requirements was discussed at the House Administration Committee hearing. JA-101.

at 309 (citation modified). It then analyzed whether the Act was both substantially related and "sufficient tailored" to that interest. The Court recognized that BCRA was a "federal statute comparable to the Act" that had been affirmed by the Supreme Court, *id.* at 308, and carefully "compar[ed] the respective disclosure requirements of BCRA and the Act to determine whether the Act survives constitutional scrutiny," *id.* Ultimately, this Court concluded that the Act was "narrowly tailored and not impermissibly broad." *Id.* at 306.

The *DSF* plaintiffs then filed a petition for certiorari in 2016, which was denied. *DSF v. Denn*, 136 S. Ct. 2376 (2016) (mem.).

3. The Current Act

The Act requires certain disclosures from organizations that spend more than a specified amount on "third-party advertisement[s]," which includes both express advocacy expenditures and ECs. The Act's definition of EC is modeled after BCRA's definition of the same term. 15 Del. C. § 8002(10).

The Act exempts several categories of speech from these disclosure requirements, including "membership communication[s]," communications relating to candidate debates or forums, and communications distributed by hand. 15 Del. C. § 8002(7), (10)(b).

The Act provides voters with information that is both accurate and timely. Once an organization spends more than $500 on covered communications, it must file a "third-party advertisement report" with the Commissioner of Elections. *Id.* § 8031(a). Reports must list the names and addresses of those contributing more than $100 to the organization during the election period; and, if a contributor is an organization, any person owning more than a 50% interest in the contributor. *Id.*

Delaware law also allows persons engaging in political activity to do so through a PAC, *id.* § 8002(19), or an unincorporated association dedicated to this activity. JA-087-89. Under the Act, a PAC is required to register with the Department of Elections and file regular disclosure reports, *id.* §§ 8005, 8030, but a PAC need not incorporate or otherwise register with Delaware's Secretary of State. Unlike federal political committees, Delaware PACs are not required to operate formally; for instance, they need not maintain a separate bank account and may "terminate" at any time upon lawful distribution of all contributed funds. *See* 52 U.S.C. §§ 30102, 30103, 30104. Unlike most federal political committees, *see infra* n.4, Delaware PACs are not subject to campaign contribution limits. JA-089. *See* 52 U.S.C. § 30116(a)(1)(C)-(D). In short, a "PAC" or unincorporated association in Delaware is functionally no more burdensome than a designated account.

By creating a dedicated PAC or other unincorporated association to fund ECs, a group can delineate which donors fund the ECs for purposes of the disclosure required under the Act. This is because the Act requires the entity that pays for ECs to disclose only the donors to the entity; the Act does not require this entity to disclose donors of its affiliates, donors, or sponsoring entity. JA-088-89. For example, when the ACLU, a nationwide organization, issues ECs in Delaware, it does so through the American Civil Liberties Union of Delaware Action Fund. Disclosures related to the ECs identify the donors to the dedicated action fund, rather than to the ACLU's nationwide organization. JA-281-294. This mechanism resembles the "segregated bank account" option of federal law, which permits groups that finance their federal ECs exclusively through such an account to report only those donors who contribute to the account. 52 U.S.C. § 30104(f)(2)(E).

Many third-party advertisers in recent elections in Delaware utilized a PAC or unincorporated association to finance their ECs. JA-088. Concerned that this option may reduce donor disclosure with respect to ECs in some instances, Delaware's General Assembly considered legislation this year to address the use of PACs and associations to finance ECs. JA-089. Ultimately the Legislature did not pass this legislation in its 2026 session but did amend the Act to adjust recordkeeping requirements and enhance communications from the Commissioner of Elections to the Delaware Department of Justice for the purposes of enforcement of the Act.

B. The Instant Litigation

1. Plaintiffs AFPF & AFP

AFPF and AFP are large national organizations founded in 2004 by billionaire David Koch, a major owner of Koch Industries.

AFPF is a group organized under Section 501(c)(3) of the Internal Revenue Code ("IRC"). In 2024, AFPF reported $4,378,810 in total revenue. Defs.' Opp. to Mot. for Prelim. Inj., D.Ct. Dkt. 21 at 6.

AFP is a group organized under Section 501(c)(4) of the IRC. In 2024, AFP reported $223,730,668 in total revenue. *Id.* AFP has long been recognized as a "major player" in U.S. politics, spending heavily at both the federal and state levels. It reports four million "activists" in all fifty states, more than one hundred offices across the country, and thirty-six individual state chapters. *Id.*

Appellants also operate an affiliated federal super PAC,[4] Americans for Prosperity Action ("AFPA"), which took in $180 million in federal receipts in 2023-24. *Id.* (citing AFPA Financial Summary, https://www.fec.gov/data/committee/C00687103/). Under federal law, the PAC is required to report any contributor of $200 or more. 52 U.S.C. § 30104(b)(3)(A).

2. District Court proceedings

AFP and AFPF initiated their action below on April 17, 2026. JA-026. They filed a motion for preliminary injunction on the same day, asking the district court to enjoin enforcement of the Act on its face, and as applied to AFP and AFPF on

[4] Super PACs are federal political committees that are legally permitted—following the D.C. Circuit's decision in *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)—to raise money outside of federal contribution limits, provided they do not coordinate with any candidate and make only independent expenditures.

grounds that their donors would likely face harassment if their identities were reported. JA-059. The State opposed the motion, arguing that the matter was controlled by this Court's decision in *DSF*, and in any event, the Act was constitutional on its face and as applied to appellants. D.Ct. Dkt. 21.

The district court heard the motion on June 8, 2026, and ruled from the bench to deny AFP's motion that day. The court held that AFP's facial claim had been "previously addressed" and decided in *DSF*. JA-009, rejecting AFP's claim that *DSF* was "obviously in conflict with the exacting scrutiny standard set forth in *Bonta*." JA-010. The district court found that appellants' as-applied claim was also unlikely to succeed because they had failed to "show[] a reasonable probability that disclosure of [their] donors names pursuant to the Delaware law will subject them to threats, harassments, or reprisals from Government officials and private parties." JA-012.

SUMMARY OF ARGUMENT

The district court was correct to deny appellants' motion for a preliminary injunction barring enforcement of the EC disclosure provisions of the Act, *see* 15 Del. C. §§ 8002(10), (27), 8031(a)(3), both on their face and as applied. This Court should affirm.

1. The district court was right to hold that this Court's decision in *DSF* forecloses appellants' facial claim.

DSF considered a First Amendment challenge to the same disclosure provisions that appellants challenge here. This Court applied exacting scrutiny, identified the government's important informational interest in transparency, and held that the Act was "narrowly tailored" to achieve this interest. *DSF*, 793 F.3d at 306. Six years later, in the course of reviewing a California tax reporting law, the Supreme Court in *Bonta* reiterated that compelled disclosure laws should be reviewed under exacting scrutiny and analyzed for narrow tailoring. 594 U.S. at 608.

Appellants do not dispute this. They nonetheless assert that *Bonta* silently "overruled" *DSF* and rendered the standard of review applied there "obsolete." AOB 17, 34. Their claim, at bottom, is that *DSF* did not, "in function," AOB 33 n.4, apply exacting scrutiny or review that Act for narrow tailoring—even though this Court expressly said it did. This Court expressly followed the judicial authority cited in *Bonta* as the correct articulation of the exacting scrutiny standard. Appellants' argument verges on frivolous and should be rejected.

2. *DSF* governs here, but even if it did not, the Act meets exacting scrutiny because it is narrowly tailored to advance the government's well-recognized state interest in informing voters "about the sources of election-related spending." *Citizens United*, 558 U.S. at 367.

Citizens United and *McConnell* upheld the federal EC disclosure law as to "the entire range" of covered communications, *McConnell*, 540 U.S. at 196, and the

Act uses the exact same criteria as federal law to define the scope of covered ECs. Any departures the Act makes from BCRA—for instance, with respect to monetary thresholds and covered media—were amply justified by Delaware's small size and the unique nature of state electoral campaigns, as the record in *DSF* confirmed, 793 F.3d at 306. Even the scope of donor disclosure under the Act—the focus of appellants' attacks—closely tracks the reporting requirements of BCRA. The federal statute, like the Act, does not limit disclosure to only those donors who "earmark" their funds; and the federal statute, like the Act, permits groups to reasonably circumscribe the donors they report by financing their ECs through a PAC or segregated account, *see* 52 U.S.C. § 30104(f)(2)(E)-(F). The Act therefore meets exacting scrutiny for precisely the same reasons BCRA did.

3. Appellants demonstrate no greater likelihood of succeeding on the merits of their as-applied claim. The district court correctly found that appellants' arguments and allegations were "insufficient" to demonstrate that AFP or AFPF's "donors will be subjected to threats, harassments, or reprisals due to the Delaware statute." JA-013. Indeed, even if appellants could prove all the allegations in their pleadings, they failed to even *allege* the type of pervasive harassment necessary for an as-applied exemption under *Buckley*, 424 U.S. at 74, and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)—the only basis for as-applied relief from a valid

disclosure law that the Supreme Court has recognized. Appellants identify no error in the lower court's ruling.

Instead, for the first time on appeal, appellants assert a new rationale for as-applied relief: the Act is not "narrowly tailored *as to Appellants*," AOB 44 (emphasis added), because, according to appellants, they are national organizations funded largely by non-Delaware donors, *id*. Insofar as this argument is meant to present a distinct basis for an as-applied exemption from an otherwise facially constitutional law, neither the argument nor the requisite factual showing was made below, and this Court should not consider it in the first instance on appeal. Even on its own terms, however, this argument is pure doctrinal invention with no support in relevant precedent. If adopted, it would render disclosure laws like the Act unenforceable. This Court should reject these as-applied claims, if it considers them at all, and affirm the district court's ruling.

ARGUMENT

I. Standard of Review

A preliminary injunction "is an extraordinary remedy [that] should be granted only in limited circumstances." *Mallet & Co. v. Lacayo*, 16 F.4th 364, 391 (3d Cir. 2021) (citation modified).

In reviewing an order on a motion for preliminary injunction, this Court "review[s] the District Court's factual findings for clear error, its legal rulings de novo, and its ultimate decision for abuse of discretion." *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 198 (3d Cir. 2024), *cert. denied sub nom. Gray v. Jennings*, 145 S. Ct. 1049 (2025) (mem.) (citing *DSF*, 793 F.3d at 308).

Four factors govern a district court's decision whether to issue a preliminary injunction: "(1) the likelihood of success on the merits; (2) the risk of irreparable injury absent preliminary relief; (3) the balance of equities; and (4) the public interest." *Id.* at 202. The first two factors are the "most critical," and if both are present, a court "balances all four factors." *Id.* (internal quotations and citation omitted).

Appellants argue that *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017), stands for the proposition that the plaintiff in a First Amendment case does not bear the burden of demonstrating a likelihood of prevailing on the merits. AOB 16. This argument is irrelevant in this instance. In this case, the district court held that *DSF* controlled this claim. JA-010. And *DSF*, by holding that the Act likely met exacting scrutiny, addressed the first prong of the preliminary injunction standard. Thus, even if the government bears the burden of showing that plaintiffs are unlikely to succeed on their merits of their challenge, *i.e.*, by "justify[ing] its restriction on speech under whatever level of scrutiny is appropriate," *Reilly*, 858 F.3d at 180 n.5, the government did so here. *See also Reilly v. City of Harrisburg*, 790 F. App'x 468, 472 (3d Cir. 2019) (affirming decision of district court on remand that plaintiffs did not "have a sufficient likelihood of succeeding on the merits of their constitutional challenge" in part because plaintiffs' arguments were "foreclosed" by an intervening Third Circuit decision).[5]

II. Appellants Are Unlikely to Succeed on the Merits of Their Facial Claim.

A. The district court correctly found that *Delaware Strong Families* forecloses appellants' facial challenge.

1. *Delaware Strong Families* is dispositive because it does not conflict with any intervening Supreme Court decision.

In *DSF*, this Court sustained the Act under exacting scrutiny and expressly analyzed whether the Act was "narrowly tailored and not impermissibly broad." 793 F.3d at 306. Appellants do not dispute that *DSF* applied exacting scrutiny, nor that it discussed narrow tailoring, AOB 33 n.4; nonetheless, appellants declare that the decision is now "obsolete" in light of *Bonta*, *id.* at 3.

But *DSF* remains controlling here unless it is "obviously in conflict with Supreme Court precedent." *Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984) (Garth, J., concurring). *See also Fenza's Auto, Inc. v. Montagnaro's, Inc.*, No. 10–3336, 2011

---

[5] Appellants argue that *Ashcroft v. ACLU*, 542 U.S. 656 (2004), holds that a plaintiff must be deemed likely to prevail on the merits of its First Amendment claim "unless the government has shown that plaintiffs' proposed less restrictive alternatives are less effective than the statute." AOB 16. But *Ashcroft* concerned a content-based law reviewed under strict scrutiny:its "least restrictive means" test, *id.* at 666, cannot be superimposed on this Court's review of the Act under exacting scrutiny.

WL 1098993, at *7 (D.N.J. Mar. 21, 2011) (noting that a court "may set aside Third Circuit precedent only if the Supreme Court has effectively overruled that precedent"). And this Court strictly enforces the Circuit rule that a three-judge panel must follow an earlier panel's decision on the same legal issue unless the Court revisits the issue en banc. Policy of Avoiding Intra-circuit Conflict of Precedent, Internal Operating Procedures ("IOP") of the United States Court of Appeals for the Third Circuit § 9.1. *See also United States v. Wolfe*, 767 F. App'x 390, 391 (3d Cir. 2019) (noting that where a Circuit precedent "has not been overruled by this Court en banc, or overruled or rejected by the Supreme Court, it binds [the] panel").

This Court's decision in *DSF* thus governs here. Appellants briefly attempt to argue that *DSF* reviewed only an as-applied holding, not a facial one, AOB 39, but as appellants elsewhere emphasize, AOB 42-43, 46, the standard of review in both inquiries is exacting scrutiny, and thus this is a distinction without a difference. Appellants offer no explanation for how the Act could survive an as-applied challenge, but fail a facial one. And appellants' entire attack on *DSF* is based on the Supreme Court's *facial* holding in *Bonta*, which they proclaim "overruled" *DSF* and rendered it "bad law," AOB 31, 33.

Although appellants' rhetoric is sweeping, they identify no conflict between the two decisions, much less an "obvious" conflict. Indeed, AFP tacitly concedes that there is no real conflict between the decisions by acknowledging that *DSF* had expressly considered whether the Act is "narrowly tailored" as *Bonta* instructs. *See* AOB 33 n.4 (quoting *DSF*, 793 F.3d at 306). AFP consequently must resort to the claim that *DSF*'s explicit holding notwithstanding, the Court's analysis there "in *function*" did not include "the features [*Bonta*] demands of the narrow tailoring inquiry." *Id.* (emphasis added). This argument rests on the charge that this Court did not conduct the analysis it said it conducted. Even if AFP had some basis for questioning *DSF*'s tailoring analysis "in function"—which AFP wholly lacks—double-guessing this Court's explicit holdings cannot vitiate the binding effect of controlling precedent. Otherwise, the Third Circuit's rule, *see* IOP 9.1, and principles of stare decisis would be rendered nullity.

2. *Bonta* reaffirmed that exacting scrutiny is the correct standard of review here.

AFP's attempt to escape the precedential effect of *DSF* turns entirely on its claim that *Bonta* implicitly overruled this decision, but its effort fails for two fundamental reasons.

First, *Bonta* was not a campaign finance disclosure case and has no direct relevance here. The Supreme Court considered a California reporting law that required charities active in the state to submit tax documents and donor information to the state attorney general, on a confidential basis, to aid the state's oversight over nonprofit entities. 594 U.S. at 601-02. The California law thus did not involve elections, nor a policy of *public* disclosure of information about the financing of charities—and thus implicated no First Amendment interest in an informed electorate.

Instead of any public informational purpose, the government's asserted interest in *Bonta* was to obtain information to aid the state's efforts to police potential fraud and misconduct in the charitable sector. While potentially compelling, this law enforcement interest was cast in doubt by evidence that the California attorney general had rarely, *if ever*, used this reporting in its enforcement activities. At the same time, the law swept broadly, requiring more than 60,000 charities to submit federal tax forms to the state with donor information. Citing the "dramatic mismatch" between the government's asserted enforcement interest and the expansive scope of the reporting requirement, the Court found the law failed exacting scrutiny. *Id.* at 612, 615.

Because *Bonta* thus contains no analysis of the government's interest in providing information to the electorate, it provides little guidance about how to assess whether a campaign finance law like Delaware's is sufficiently tailored to advance this interest. AFP's claim that *Bonta* overruled *DSF* thus relies on a case that is both factually and legally distinct from this one.

Second, *Bonta* provides no support for AFP's attempt to evade *DSF* because it reaffirmed the standard of review applied by this Court there.

In challenging California's reporting law, the plaintiffs in *Bonta* had urged the

Supreme Court to apply strict scrutiny, distinguishing, for the purpose of their argument, campaign finance laws like Delaware's that received exacting scrutiny. The Court declined to create the two-tier system of review that the plaintiffs requested. Instead, drawing upon campaign finance precedents like *Buckley* and *Citizens United*, it reaffirmed that that the exacting scrutiny it applied in those cases was the appropriate standard for *all* types of donor disclosure laws. *Id*. at 608 (citing *Buckley*, 424 U.S. at 64-68; *Citizens United*, 558 U.S. at 366-367; *Davis v. FEC*, 554 U.S. 724, 744 (2008)).

In the alternative, the *Bonta* plaintiffs had urged the Supreme Court to incorporate a "least restrictive means test" into exacting scrutiny. *Id*. at 608. The Court rejected this request as well, explaining that that exacting scrutiny requires "disclosure regimes" to be "narrowly tailored to the government's asserted interest" but not "the least restrictive means of achieving their ends." *Id*.

Despite *Bonta*'s reaffirmation of exacting scrutiny, appellants claim that the Supreme Court rendered the standard of review applied in *DSF* "obsolete." AOB 3. Their flawed theory is that *Bonta* effectively *changed* exacting scrutiny by "clarif[ying]" that it requires narrow tailoring review, *id*. at 19, and the *DSF* decision is no longer binding because it preceded this "clarification."

But the Supreme Court's own opinion refutes appellants' interpretation. At no point did *Bonta* explicitly or implicitly suggest that it was altering the tailoring analysis entailed in exacting scrutiny. To the contrary, the plurality opinion drew the exacting scrutiny standard from its campaign finance case law and made clear that the "need for narrow tailoring" was present throughout its precedents, both "early in [its] compelled disclosure cases" and in "more recent decisions." 594 U.S. at 608-09. The plurality expressly rejected the dissent's position that earlier political disclosure cases like *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), had employed a standard that required only a "modest level of tailoring." 594 U.S. at 611. Instead, the Court maintained that cases like *Reed* had in fact narrowly reviewed tailoring because the Court there had upheld disclosure "only after [it] concluded that various narrower alternatives proposed by the plaintiffs were inadequate." *Id.*

AFP attempts to counter this analysis by suggesting that not *all* lower courts had conducted a narrow tailoring analysis in applying exacting scrutiny prior to *Bonta*, highlighting that the Supreme Court had faulted the Ninth Circuit for failing to adequately review the tailoring of the California law at issue. AOB 31 (citing *Bonta*, 594 U.S. at 611-12). But *Bonta* found the Ninth Circuit in error precisely because the Supreme Court understood narrow tailoring to be part of exacting scrutiny in all its relevant precedents. 594 U.S. at 608-09. The plurality in no way suggested that *other* disclosure decisions by appellate courts had employed an "obsolete" standard of review or failed to analyze narrow tailoring when applying exacting scrutiny. Indeed, the cases cited in *Bonta* as the models for exacting scrutiny—such as *Buckley* and *Citizens United*—are the same cases that guided this Court in *DSF*. *See* 793 F.3d at 309-310.

And in fact, if appellants were correct that *Bonta* had materially altered exacting scrutiny across the board, this would implicate all disclosure precedents predating *Bonta*—not just *DSF*. *McConnell* and *Citizens United* display all the supposed defects that appellant purports to identify in *DSF*. Neither *McConnell* nor *Citizens United* expressly stated that exacting scrutiny requires narrow tailoring. Nor did *McConnell* or *Citizens United* enumerate a laundry list of "less intrusive alternatives" to the federal law as appellants demand, *see* AOB 20, 32. Finally, contrary to appellants' claims, *id.* at 34-35, neither decision limited federal disclosure to only those contributions that are explicitly "earmarked" for campaign purposes. *See infra* at 35-36. Appellants' contention that *Bonta* makes *DSF* "obsolete," AOB 3, is tantamount to arguing that *Bonta* also renders *Buckley*, *McConnell* and *Citizens United* obsolete.

3. *DSF* correctly reviewed the Act for narrow tailoring.

Even accepting arguendo that *Bonta had* "heightened" exacting scrutiny by adding a new narrow tailoring requirement as appellants claim, AOB 31, *DSF* in fact conducted this type of "heightened" review. Appellants concede that *DSF* expressly considered "narrow tailoring," AOB 33 n.4, and ultimately can find no defect in this Court's tailoring analysis "in function," *id.*, either.

As the district court noted, *DSF* looked carefully at the Act's tailoring, considering in turn its monetary thresholds, 793 F.3d at 310-11, the media covered, *id.* at 311, and the scope of donor disclosure, *id.* at 311-12. *See also* JA-010 (noting DSF specifically considered and rejected challenges to "the Act's monetary thresholds, the types of media covered, the length of the statutory 'election period,' and the lack of so-called earmarking provisions"). *DSF* assessed the First Amendment burdens alleged by the plaintiffs there as to each such feature and the degree to which features were necessary to achieve the government's informational interest. *DSF*, 793 F.3d at 310-12.

Indeed, the only "functional" flaw in this tailoring analysis alleged by appellants is *DSF*'s purported failure to "consider the Act's burdens 'in light of any less intrusive alternatives.'" AOB 32. As a threshold matter, although *Bonta* noted that narrow tailoring often entails the consideration of less restrictive alternatives to the law at issue, it did not purport to make this inquiry the sole or dispositive element of exacting scrutiny review. Indeed, this could not be the case given that the very precedents from which *Bonta* drew the exacting scrutiny standard—including *Citizens United*, 558 U.S. at 366-67, and *Davis*, 554 U.S. at 744—did not consider a long list of alternative measures in the manner appellants demand. Instead, *Bonta* instructed more broadly that the "point" of narrow tailoring review was simply to make a "reasonable assessment of the burdens imposed by disclosure" and the extent to which they "are unnecessary." 594 U.S. at 611.

But even if the express consideration of less intrusive alternatives were a mandatory element of narrow tailoring review, this Court conducted such a review in *DSF*. Appellants turn a blind eye to the fact that a key aspect of *DSF*'s analysis was its point-by-point comparison of Delaware's EC disclosure requirements to the sometimes "less restrictive" federal model. The Court made note of each feature of the Act that departed from BCRA—including for instance, the discrepancies in the law's monetary thresholds and covered media, *DSF*, 793 F.3d at 310-11—and considered at length whether the record justified Delaware's choice of different criteria for EC disclosure, *id*. Yet appellants say nothing about this part of the decision and go so far as to argue that *DSF* "mentioned zero alternatives to the scope [of media] the Delaware legislature selected." AOB 32. But this Court *expressly quoted* BCRA to contrast its coverage of "broadcast, cable, or satellite communication" to the Act's more extensive coverage of communications on "television, radio, newspaper or other periodical, sign, Internet, mail or telephone," *see DSF*, 793 F.3d at 311 (quoting 52 U.S.C. § 30104(f)(3)(A)(i)).[6] Appellants make

---

[6] Appellants also object to how *DSF* evaluated the Act's monetary thresholds, but they conflate narrow tailoring review, which concerns the overall design of a statute, with the review of the *precise* dollar amount at which thresholds are set. Since *Buckley*, courts have been reluctant to double guess the latter, viewing this as a "judgmental decision, best left . . . to congressional discretion," 424 U.S. at 83, and approving specific dollar amounts unless they are "wholly without rationality," *id*. Contrary to appellants' suggestion, the application of "rational basis" to this narrow

no attempt to explain why this Court's consideration of BCRA—the most relevant potentially "less intrusive alternative" for the purposes of EC disclosure—was not sufficient.

Appellants also make much of *DSF*'s mention that "an earmarking limitation would result in a *more* narrowly tailored statute." AOB 32 (quoting *DSF*, 793 F.3d at 312) (emphasis added), but there is no requirement that a state choose the "*most* narrowly tailored" disclosure option. A disclosure law can almost always be made less comprehensive and "more narrowly tailored" but "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends[.]" *Bonta*, 594 U.S. at 608. As *DSF* noted, "BCRA itself does not contain an earmarking requirement," 793 F.3d at 311-12, and thus there was no reason why Delaware had to limit disclosure to earmarked contributions to meet exacting scrutiny either.

With little to no critique in the *DSF* decision itself, appellants rely heavily on dicta in a Tenth Circuit case, *Wyoming Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023), to attack this Court's tailoring analysis. *See* AOB 30 (claiming that *DSF* was a "a relic of pre-[*Bonta*] exacting scrutiny") (quoting *Gray*, 83 F.4th at 1249). The

issue is thus not a new approach initiated by the First Circuit, nor inconsistent with narrow tailoring. *See* AOB 32-33 (quoting *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), *abrogated in part on other grounds by Bonta*, 594 U.S.).

Tenth Circuit's criticism rests on a faulty understanding of *Bonta*, which did not change the standard of scrutiny, and *DSF*, which in fact analyzed the Act for narrow tailoring. *See supra* at 20-25. Extraordinarily, appellants nonetheless claim that this panel should follow the Tenth Circuit, instead of its own Court. AOB 14. But of course, *DSF*, not *Gray*, is controlling here.[7]

Substantively, the Tenth Circuit was most concerned that *DSF* had approved of donor disclosure without an earmarking limitation, but this criticism is also unfounded. No court has held that a state may only compel the disclosure of those contributions specifically "earmarked" for campaign purposes, and *McConnell* and *Citizens United* indicate the opposite. *See infra* at 35-36. Indeed, the Tenth Circuit conceded that there was no constitutional basis to hold that "legislatures must include an earmarking provision to survive narrow tailoring." 83 F.4th at 1249 n.8.

And the Tenth Circuit has since stepped back from even this partial embrace of earmarking. More recently, in *Rio Grande Foundation v. Oliver*, 154 F.4th 1213

---

[7] The Tenth Circuit's concerns about the scope of donor disclosure related to the void-for-vagueness argument present in *Gray*—an issue with no analogue here *See* 83 F.4th at 1237 (finding that Wyoming reporting requirement for donors whose donations "relate to" electioneering communications was "impermissibly vague"). Because Wyoming's imprecise provision potentially, but inadvertently, required near-plenary disclosure of donors, the Tenth Circuit held that it was not narrowly tailored. But this vagueness concern does not apply here because the Act employs the same "easily understood and objectively determinable" criteria as the federal EC law upheld in *McConnell*. 540 U.S. at 194.

(10th Cir. 2025), the Court upheld a New Mexico law that requires groups funding ECs above a threshold amount through their general treasury to disclose all donors exceeding the statutory threshold. N.M. Stat. § 1-19-26(Q), § 1-19-27.3(D). The majority opinion rejected the dissent's argument that the law was not sufficiently tailored because it lacked an earmarking requirement and other narrowing features, *id.* at 1234-35, noting that under *Bonta* the reporting requirement need not be "the least restrictive means of achieving [New Mexico's] ends," *id.* at 1228.

B. The Act is constitutional because it is narrowly tailored to advance the important governmental interest in an informed electorate.

The "exacting scrutiny" standard applicable here "requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored to the interest it promotes." *Bonta*, 594 U.S. at 611 (internal citations omitted). The Act is fully consistent with that standard—as this Court already held in *DSF*. But even assuming *DSF* does not control the outcome here, the tailoring inquiry undertaken there used the right standard and reached the right result. As was true a decade ago, the Act remains narrowly tailored to advance the government's important state interest in informing voters "about the sources of election-related spending." *Citizens United*, 558 U.S. at 367.

1. Delaware's interest in informing voters about the sources of election-related spending is well established and compelling.

The Supreme Court has long recognized that electoral disclosure laws in most circumstances are "the least restrictive means of curbing the evils of campaign ignorance and corruption," *Buckley*, 424 U.S. at 68. So too here. Delaware's Act, like the federal law upon which it was modeled, serves the well-established state interest in informing voters "about the sources of election-related spending." *Citizens United*, 558 U.S. at 367. Appellants nevertheless argue that the informational interest is categorically "inadequate" to justify the Act. AOB 21-23. That claim, however, runs headlong into a half-century of Supreme Court precedent holding the opposite.

The disclosure provisions upheld in *Buckley* required "[e]very person" making a minimum amount of "expenditures" to disclose, *inter alia*, the name and address of each person who made contributions of at least $100 in a calendar year. 424 U.S. at 74-84; *see also id.* at 157-58, 160. The Supreme Court upheld these disclosure requirements as advancing three substantial government interests: "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate'"; "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity"; and gathering data necessary to detect violations of the law. *Id.* at 66-68. The first of these interests, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369.

After Congress broadened FECA's disclosure requirements by enacting BCRA, *see supra* at 3-5, the Supreme Court held that the same three interests likewise justified disclosure as to "the entire range of 'electioneering communications,'" ensuring that the public could "'identify the source of the funding behind broadcast advertisements influencing certain elections.'" *McConnell*, 540 U.S. at 196. *See also Citizens United*, 558 U.S. at 369.

Undeterred by this authority, appellants suggest that the disclosure holdings in *McConnell* and *Citizens United* were somehow limited to "paid for by" disclaimers or sponsorship reporting requirements, and do not extend to disclosure of the contributors funding the campaign advertising. *See* AOB 22. Wrong again. In facially upholding the federal law—including its donor disclosure requirements—*McConnell* specifically recognized that it was impossible for "'uninhibited, robust, and wide-open' speech [to] occur when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (per curiam)). When groups are not required to disclose their contributors, the Court noted, they often conceal the true nature of their support by hiding behind "mysterious" and anodyne names like "'American Family Voices.'" *Id.* at 128 & n.23. Similarly, *Citizens United* sustained the same EC provisions because "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371. Without such disclosures, it is impossible for voters to weigh the "source and credibility" of an organization's arguments. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978). As the Supreme Court has repeatedly confirmed, requiring election advertisers to disclose their contributors ensures that voters can discern the people and interests behind the campaign-related messages they see, even when entities "adopt seductive names" that obscure their true purposes and affiliations. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981).

The assertion that Delaware's transparency objectives can be achieved without any disclosure of who is behind covered ECs not only defies this precedent but ignores reality. *See* AOB 22, 36. Given that groups often deliberately use anodyne names—and even well-known names like "Americans for Prosperity" say little about the group's backers—limiting the Act to reach only the immediate sponsor of a covered advertisement, while shielding its contributors from publicity, would thwart the Act's transparency goals. Indeed, there is no alternative means of achieving the Act's informational interest without its donor disclosure requirements.

The Supreme Court's recent decision in *NRSC* only reaffirms these principles. Although *NRSC* concerned the federal limits on coordinated party expenditures rather than disclosure requirements, the Court stressed that disclosure advances the important governmental interest in "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 2026 WL 1868932, at *10. And, the Court noted, the utility of disclosure was only increasing as "modern technology provides a particularly effective means of arming the voting public with information." *Id.* (internal quotation marks and citations omitted).

Ignoring the overwhelming weight of this precedent, appellants turn to *Bonta*, but *Bonta* did nothing to question the informational interest in electoral disclosure. Unlike the Act, California's tax-reporting regime did not implicate any interest in voters' informational rights, so the suggestion that Delaware's interest in "[t]his case is no different" from California's is patently false. AOB 23. Indeed, showing their willful misapprehension of the Act's purpose, appellants try to fault Delaware for "a policy of public exposure on the internet," comparing it to California's "promise of confidentiality." AOB 38. But the very point of an electoral disclosure law is to bring important election information *to the public*. Far from being "presumptively unconstitutional" or lacking any "plausible interest" to support it, AOB 22-23, the Act serves the "government's substantial interest in transparent elections—the bedrock of our democracy." *Gaspee Project v. Mederos*, 13 F.4th 79, 94 (1st Cir. 2021).

2. The Act is narrowly tailored to advance the State's informational interest.

The Act's threshold criteria and numerous narrowing features ensure its disclosure requirements are tightly tied to their informational objectives. The Act uses the exact same criteria as BCRA to define the scope of covered ECs. *See supra* at 6-9. Its voter-targeting threshold, the 30- and 60-day pre-election time periods in which it applies, and its monetary thresholds for disclosure all confirm a close nexus between the Act's transparency objectives and local campaign practices. *Id.* It expressly exempts several categories of speech, including handbills like those at issue in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)—an inapposite case that appellants nonetheless cite here. AOB 22. Finally, like BCRA, it provides a mechanism for groups like appellants to segregate their electioneering funds from general revenues and thereby tailor the reach of donor disclosure. These characteristics sharply distinguish Delaware's law from the regulation in *Bonta*, which created a "dramatic mismatch" between California's tax disclosure regime and its "weak[]" interest in administrative convenience of such disclosures. 594 U.S. at 614-15.

The Delaware General Assembly modeled the Act on BCRA but crafted its monetary thresholds and covered media to fit the unique circumstances of Delaware campaigns. These minor deviations from BCRA ensure the Act advances its transparency goals in the much smaller jurisdiction and local elections it covers. The

Act's adaptations of BCRA support—and certainly in no way constitutionally undermine—the narrow fit between the statute and the State's interest in a well-informed electorate.

3. Appellants' contrary tailoring arguments are foreclosed by precedent and otherwise fatally unsound.

In attempting to relitigate the Act's tailoring, Appellants largely turn to the same flawed arguments that this Court rightly rejected in *DSF*. They charge that the Act categorically fails to advance its informational objectives, and thus fails constitutional scrutiny, because of its supposed "lack of tailoring" with respect to "purpose, time, or dollar amount," AOB 28; because the disclosure it prescribes is not limited to in-state contributors who intentionally earmark funds for a particular Delaware candidate or purpose, *id.* at 24-29; and because it is based on a look-back period that mirrors the length of the relevant candidacy, *id.* at 24-25. According to appellants, these supposed deficiencies render the Act "unconstitutional in every iteration as to everyone." *Id.* at 14. But appellants' repackaged tailoring arguments all fail because identical arguments were considered and rejected in the governing Supreme Court and Third Circuit precedents.

a. Earmarking is not a constitutional requirement.

Appellants complain that the Act "sets no geographic-limit on donors or use-limit on donated funds." AOB 24-25. But their solution to this perceived problem—mandating an earmarking requirement that would limit disclosure based on a donor's subjective intent and state of residence—would vitiate the Act's transparency purposes, rather than resolve any constitutional issues.

An earmarking limitation on donor disclosure is not a compulsory feature without which a disclosure law fails to show narrow tailoring. In *McConnell* and *Citizens United*, the Supreme Court upheld the federal EC disclosure law as to "the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 196, without regard to any earmarking requirement.

In attempting to wave away this clear precedent, appellants place undue weight on the fact that the FEC, on its own initiative, promulgated a regulation in 2007 providing that corporations funding ECs need to disclose only those contributions earmarked for covered communications. But this regulation was adopted four years after *McConnell* upheld the federal statute on its face. *See supra* at 5-6; *McConnell*, 540 U.S. at 194-202. And although the FEC regulation had been adopted by the time of *Citizens United*, neither the parties nor the Supreme Court relied on it. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished). Indeed, even the FEC, when it first promulgated rules to implement BCRA in 2003, acknowledged that BCRA "specifically mandates disclosure" of donor information by "all persons who make electioneering communications," regardless of their corporate form or subjective intent. 68 Fed. Reg. 404, 414 (Jan. 3, 2003) (codified at 11 C.F.R. § 104.20).

The assertion that "no *judicial* authority [] back[s] up Delaware's argument" about earmarking, AOB 35, is therefore incorrect. And following *Citizens United* and *McConnell*, appellate courts, including this one, have likewise understood those decisions as confirming the constitutionality of statutes requiring organizations to comprehensively disclose contributors, regardless of whether the contributions are earmarked. In *DSF*, this Court rejected the claim "that the Act must limit disclosure to those donors who earmarked their donations," recognizing that "[n]othing in *Citizens United* implies that the Court relied upon the FEC earmarking regulation when approving of BCRA's disclosure regime." 793 F.3d at 311-12. *See also Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding disclosure requirement without earmarking limitation because "*McConnell* compels us to find that [it] is constitutional"); *Fam. PAC v. McKenna*, 685 F.3d 800, 803 (9th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 472 (7th Cir. 2012). *Cf. Wyoming Gun Owners*, 83 F.4th at 1249 n.8.

Indeed, far from restricting donor disclosure to earmarked funds, federal circuit courts have consistently upheld laws requiring near plenary donor disclosure. The First Circuit, for example, has applied *Bonta*'s "narrow tailoring" standard to uphold a Rhode Island disclosure law that requires groups spending more than

$1,000 on electioneering communications to report *all* donors over a statutory threshold. *Gaspee Project*, 13 F.4th at 95; *see also* R.I. Gen. Laws § 17-25.3-1(b), (h). Similarly, two different courts have upheld the comprehensive "trace back" disclosure law in Arizona that requires groups funding ECs to report not only their immediate donors, but to track back their donations to the original source. *Ctr. for Arizona Pol'y Inc. v. Arizona Sec'y of State*, No. CV-24-0295-PR, 2026 WL 1911955 (Ariz. June 29, 2026); *AFP v. Meyer*, 724 F. Supp. 3d 858, 878 (D. Ariz. 2024), *appeal docketed*, No. 24-2933 (9th Cir., argued May 15, 2025). The plaintiffs there complained that the law "requires the disclosure of the entire chain of donors," even those donors who did not earmark their funds or even know who the eventual recipient of their contribution was. *Meyer*, 724 F. Supp. 3d at 877. But the court nevertheless held that the law was narrowly tailored, noting that the "aim" of disclosure laws are "to identify who is funding political advertisements," and this was true "even if particular donors might disagree with certain messages they are funding" down the chain of donations. *Id.*

As the Ninth Circuit recently found, no court has held that a law "fails narrow tailoring unless it is limited to the disclosure of earmarked contributions." *No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu*, 62 F.4th 529, 545 (9th Cir. 2023). Indeed, the Fourth Circuit reversed a lower court decision for *imposing* an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Tennant*, 706 F.3d at 292. *See also Justice v. Hosemann*, 771 F.3d 285, 289 (5th Cir. 2014) (upholding law requiring groups to itemize and report all contributions of $200 or more); *Vt. Right to Life Comm., Inc.* v. *Sorrell*, 758 F.3d 118, 124 (2d Cir. 2014) (committees must file reports "identifying each person who contributed more than $100"); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013) (groups must disclose all donors starting from "first-dollar disclosure threshold").

None of the laws sustained in the cases above, save Arizona's and Rhode Island's, included the "opt-out system[s]" that appellants demand here. AOB 13. And although appellants highlight these opt-outs as a means to distinguish the many disclosure laws upheld by courts nationwide, they ignore that Delaware has provided spenders with an arguably *more* effective mechanism for limiting their donor disclosure. The Act allows groups to register a Delaware-specific association or PAC to sponsor their ECs—which is accomplished via a simple online form—and then disclose only those donors whose money is transferred to this PAC. Appellants complain that this option forces them to "tailor their activities differently," AOB 35, but Delaware's option requires far less "tailoring of activities" than would Arizona's donor opt-out system or federal law's "segregated bank account" route. *See* A.R.S. § 16-972(B), (C); 52 U.S.C. § 30104(f)(2)(E). Further, appellants' complaints appear to be founded on the misperception that Delaware imposes the same formal organizational requirements and contribution limits on PACs as federal law does. *See supra* at 9-10. They cite *Citizens United* for this proposition, AOB 35, but that case concerned federal requirements for corporate PACs and FECA's ban on corporate election spending using funds raised outside these PACs. This federal system has no analogue in Delaware. A "PAC" in Delaware is simply an alternative entity formed to facilitate campaign finance reporting. JA-087-088.[8]

Nor are appellants correct that an earmarking limitation would actually make the Act more narrowly tailored. "Money is fungible[.]" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010). Donors may reasonably be expected to know the causes advanced by the organizations to which they give money, and voters have an interest in knowing who is behind the electioneering messages they hear. Appellants complain that their non-Delaware donors may be subject to disclosure absent an earmarking requirement, but the prospect of undisclosed spending—regardless of its geographic origin—impacting state elections is precisely why Delawareans decided, through their legislative representatives, to subject that spending to the light of disclosure. JA-86. Appellants' website touts their intent to engage in nationwide

[8] There is no bar to AFPF or any 501(c)(3) group registering a PAC or association in Delaware. AOB 35. Federal tax law prohibits 501(c)(3) groups from "interven[ing] in . . . any political campaign on behalf of . . . any candidate for public office," 26 U.S.C. § 501(c)(3), but this prohibition constrains AFPF's political spending regardless of whether it forms a PAC or association to disclose its ECs in Delaware.

political advocacy. D.Ct. Dkt. 21 at 6 (citing, e.g., *About AFP*, https://americansforprosperity.org/about/). An earmarking limitation, however, would enable groups to subvert the aims of disclosure by allowing them to report only those donors who were honest or unsophisticated enough to expressly designate their funds for campaign ads. *See supra* at 5-6. Oftentimes this will result in no donor disclosure whatsoever.

Appellants' chief complaint appears to be their presumption that the Act may reach out-of-state contributors who allegedly lack the subjective "purpose" of supporting ECs in Delaware. Whether such contributors actually exist—and the current record cannot answer that question because it is limited to appellants' unsupported allegations on both fronts—it does not follow that voters lack any interest in those contributions. A hypothetical "unintentional" donor who gives money to a group that makes covered ECs in Delaware *did* support those ads: the donor's money made the ads possible, either in whole or part. And out-of-state interests can and frequently do seek to influence the political affairs of their neighbors—particularly in Delaware, the nation's corporate capital. *See* JA-085-086. Limiting disclosure as appellants request would simply enable groups to conduct their Delaware electioneering in secret.

More fundamentally, the benefit of using the same "easily understood and objectively determinable" criteria as federal law to delineate the Act's requirements, *McConnell*, 540 U.S. at 194, is that it avoids the pitfalls—and potential vagueness—of laws relying on subjective intent. In appellants' telling, however, the First Amendment requires an inquiry into each donor's individual "purpose" before the Act's disclosure provisions can be applied, or at least a special rule for "national" groups that have donors and interests outside the state of Delaware. AOB 43; *see also infra* at 48-50. That suggestion is absurd. The intent limitation appellants champion is no more rational or workable than the "neutral communicator" carve-out this Court rejected in *DSF*. 793 F.3d at 308 ("This formulation finds no support in the case law and is not one that we choose to adopt.").

b. The Act's dollar thresholds and temporal periods are appropriately tailored and consistent with similar laws in other jurisdictions.

Appellants below emphasized that their tailoring challenge concerned the supposed scope of donor disclosure under the Act, JA-329. But on appeal they critique multiple aspects of the Act's design, striving to portray the Act as an outlier. But Delaware's Act is well within the range of analogous EC disclosure laws adopted in other states, and narrowly tailored to advance Delaware's informational interests.

First, appellants criticize the temporal "look back" period, but the Act sensibly tracks the relevant candidacy—for incumbents, the term of office; and for challengers, the period beginning from receipt of the first qualifying contribution to a candidate committee. 15 Del. C. §§ 8002(11), 8031(a). Contributions made in those periods foreseeably may assist organizations engaging in relevant election-related speech. In contrast, limiting the look-back period to only a fraction of the candidate's election cycle, as appellants wrongly imply is a constitutional necessity, would obscure important information about early campaign fundraising and could easily be gamed to evade disclosure altogether.

Second, the monetary threshold at which disclosure obligations commence—*i.e.*, $500 in aggregate spending for ECs—is tailored for the small state elections it covers. It is also similar to the range of thresholds used in analogous laws elsewhere. Alaska and Vermont employ the same $500 spending threshold as Delaware. *See* Alaska Stat. §§ 15.13.040, 15.13.110; Vt. Stat. tit. 17, § 2971. Several states require reporting at lower expenditure amounts: Alabama requires reporting at $100, Ala. Code § 17-5-8(d)(7); Washington at $100, Wash. Rev. Code § 42.17A.305; Illinois at $150, 10 Ill. Comp. Stat. 5/9-1.8, 5/9-9.5, 5/9-11; Maine at $250, 21-A Me. Rev. Stat. §§ 1014, 1019-B; and Oregon at $250, Or. Rev. Stat. § 260.083.[9]

Although Delaware's thresholds depart from those of BCRA, they are justified in light of the practical realities of state elections, as *DSF* recognized, 793 F.3d at 306. For instance, Delaware lacks its own major-network television market, and

[9] Delaware's donor-itemization threshold, *see* 15 Del. C. § 8031(a), is also in line with comparable laws in other jurisdictions. Several state laws employ the same $100 threshold as Delaware. *See* Ala. Code § 17-5-8; Conn. Gen. Stat. § 9-608; Utah Code § 20A-11-901; Vt. Stat. Ann. tit. 17, § 2971; Wyo. Stat. § 22-25-106. Others require disclosure beginning at a lower amount—$50. Alaska Stat. §§ 15.13.040, 15.13.110; Idaho Code § 67-6628; Okla. Admin. Code 257:10-1-14, -16.

neighboring television markets are prohibitively expensive. Consequently, television advertising is rare in Delaware races. JA-084-85. Because less costly media, such as direct mail, instead accounts for a large share of campaign spending, groups need not spend large sums of money to reach Delaware voters. *Id*. The Act's adjustments to BCRA therefore support—and in no way constitutionally undermine—the narrow fit between the statute and the state's interest in an informed electorate.

c. Appellants' claims of voter confusion have no basis.

When voters are targeted with electioneering ads that seek to influence their choices at the polls, they have an interest in knowing the financial backers of those ads. Appellants theorize that such transparency may not be informative to Delaware voters or even might "mislead" them. AOB 22, 30. But *Citizens United* confronted similar arguments that disclosure would "not help viewers [of electioneering ads] make informed choices in the political marketplace," and the Supreme Court roundly rejected them, 558 U.S. at 369. It held instead that "the public has an interest in knowing who is speaking about a candidate shortly before an election," "[e]ven if the ads only pertain to a commercial transaction," *id.* Delawareans' informational interest here is no less substantial.

Depriving voters of that information—or excusing out-of-state donors and "national organizations" from providing it—would cripple the law's effectiveness and leave voters in the dark. "The premise of the First Amendment is that the

American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source." *McConnell*, 540 U.S. at 258-59 (Scalia, J., concurring in part and dissenting in part). The Supreme Court has repeatedly rejected the cynical assumption that voters will be confused or misled by objective election information: "our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454-55 (2008) (internal citations and quotation marks omitted).

III. Appellants Are Unlikely to Succeed on the Merits of Their As-Applied Claim.

The district court also rejected appellants' as-applied claim, finding that the record before the court was "insufficient" to demonstrate that appellants' "donors will be subjected to threats, harassments, or reprisals due to the Delaware statute." JA-013. Appellants offer nothing to suggest the lower court ruling was in error.

Now on appeal, appellants test a new rationale for as-applied relief, namely that the Act is not "narrowly tailored *as to Appellants*," AOB 44 (emphasis added), because, according to appellants, they are national organizations funded almost entirely by non-Delaware donors, *id.* Insofar as this argument is meant to present a distinct basis for an as-applied exemption from an facially constitutional law, it is a doctrinal invention with no support in relevant campaign finance precedents. Further, neither the argument nor the requisite factual showing was made below, and therefore the argument has been waived and should not be considered in the first instance here.

A. Appellants demonstrated no valid basis for as-applied relief.

The Supreme Court has recognized only one basis for an as-applied exemption from a facially constitutional disclosure law: when "there [is] a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; *see also Buckley*, 424 U.S. at 74; *Doe*, 561 U.S. at 200. This exemption was designed to protect "dissident" viewpoints that would otherwise be removed from "the free circulation of ideas." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91, 93 (1982). Groups who have won this exemption have often confronted not only private hostility, but also governmental harassment and surveillance. *See id.* at 98-100; *NAACP*, 357 U.S. at 462.

Appellants failed to show that their organizations and donors had suffered the kind of harassment or reprisals that warranted exemptions for the sixty-member Socialist Workers Party or the NAACP in the 1950's. Indeed, far from meeting the standard for a preliminary injunction, most of appellants' allegations of harm are so general and conclusory that they would not survive a motion to dismiss. As the district court found, their "as-applied challenge is based on generic allegations and/or allegations regarding contexts unrelated to disclosure of donors in the election communications context." JA-011.

For these reasons, another federal district court recently rejected a similar as-applied claim by AFPF and AFP in their challenge to Arizona's trace-back disclosure law. *Meyer*, 724 F. Supp. 3d at 879 (dismissing plaintiffs' as-applied claim because it was "based on generic allegations regarding the treatment of their donors in unrelated matters"). Appellants' allegations of harm here similarly lack specificity. *See, e.g.*, JA-033-035 ¶¶ 36-37, 41, 43, 45.

Most crucially, appellants failed to allege any harassment suffered by their *donors* because their names or other information were disclosed in a campaign finance report or similar disclosure. To the extent they cited any specific incidents of harassment, almost all involve the experiences of appellants' leadership and public-facing associates—and were occasioned by their public advocacy and activities, not in response to information gleaned from disclosure reports filed with a government agency. But appellants must show a reasonable probability that *disclosure under the Act* will be the cause of any donor harm. As the Arizona district court explained when rejecting AFPF and AFP's as-applied claim there, although plaintiffs "need not make voluminous allegations of possible harm, they must make some allegations that can plausibly be tied to [Arizona law]," including a "factual basis for believing the disclosures required by [Arizona law] will lead to 'threats, harassment, or reprisals.'" *Meyer*, 724 F. Supp. 3d at 879. AFPF and AFP made the same mistake here.

This omission is even more glaring because appellants operate an affiliated super PAC that took in $180 million in federal receipts in 2023-24. D. Ct. Dkt. No. 21 at 6. In the same period, the PAC reported the names of more than two thousand donors. *Id.* Appellants made no allegation that any of these PAC contributors has ever faced harassment from this disclosure.

Instead of making adequate submissions to the district court below, appellants reference the records purportedly created in *other* cases concerning the activities of AFP and AFPF and dicta therein regarding harassment. *See* AOB 47-48. But no case has granted either AFP or AFPF an as-applied exemption from disclosure based on donor harassment.[10] And appellants cannot excuse their failure to submit sufficient—or any—evidence of donor harassment *here*, by merely gesturing at unrelated cases elsewhere.

B. There is no "tailoring" basis for an as-applied exemption from a facially constitutional disclosure law.

Given the "scant" "evidence and argument presented by [appellants] for their

---

[10] Appellants cite an unpublished New Jersey decision, *AFP v. Grewal*, No. 3:19-cv-14228, 2019 WL 4855853, at *20 (D.N.J. Oct. 2, 2019), but the court there made no findings as to whether AFP merited an as-applied exemption from the law at issue. And in *Bonta*, the district court's grant of a preliminary injunction barring enforcement of California's law as applied to AFPF was reversed by the Ninth Circuit, which found that AFPF had not shown a reasonable probability of harassment by either the state or the general public. *AFPF v. Harris*, 809 F.3d 536, 540-41 (9th Cir. 2015).

as-applied challenge" below, JA-012, it is unsurprising that appellants now invent a new basis for as-applied relief, one that does not demand a demonstration of probable donor harm, AOB 44-45. Their novel theory is that a plaintiff group can claim an as-applied exemption by alleging that a disclosure law is insufficiently tailored as to its organization and donor base—even if the law is narrowly tailored and constitutional on its face.[11]

More specifically, appellants claim their allegedly unique base of largely out-of-state donors renders the Act particularly poorly tailored as applied to their organizations, and that consequently "[t]he State has no interest in knowing about any of it." AOB 42. This was not an argument or a factual showing that appellants made in district court, *see* JA-042 ¶¶ 75-77; D. Ct. Dkt. 5 at 23-24, and this Court should "refuse to consider issues," like this one, "that the parties have not raised below." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013). *See also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of

[11] Appellants' new as-applied argument is not a model of clarity: they may be merely requesting, in the alternative, as-applied relief for AFPF and AFP on the same grounds that they request facial relief, namely, their view that the Act does not meet exacting scrutiny. Indeed, at various points, appellants seem to concede that they are asking the Court to run the same constitutional inquiry with respect to both claims. *See* AOB 46 ("Exacting scrutiny thus applies equally to Appellants' as-applied challenge and their facial challenge."); *id.* at 43 (the "lack of narrow tailoring" "supports both . . . facial and as-applied challenges") (citation modified). Insofar as appellants seek as-applied relief on the same grounds as they seek facial relief, both claims fail for the same reason: the Act is narrowly tailored to advance Delaware's important informational interest, as this Court already held in *DSF*.

course, that a federal appellate court does not consider an issue not passed upon below.”).

But even putting aside appellants’ forfeiture of this argument, it fails because there is no constitutional or factual basis for the “geographic” limitation on disclosure that appellants demand. Moreover, the claim’s fundamental premise is fatally incoherent as a matter of constitutional doctrine. The review of a statute’s tailoring assesses its overall design or “fit” with respect to its objectives and considers whether any burdens the law may impose are “in proportion to the interest served.” *Bonta*, 594 U.S. at 609 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)). Tailoring is thus inherently a *facial* question: a structural analysis of how closely a statute’s means serve its ends, not a one-off assessment of the law’s application to a specific individual. *See Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (noting that narrow tailoring looks at “the relation [the law] bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interest in an individual case”); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984) (noting that prohibition on camping in certain National Parks was “constitutional on its face” and thus “it is evident from our cases that the validity of this regulation need not be judged solely by reference to the demonstration” underlying the lawsuit).

Appellants cite no Supreme Court or Third Circuit case that has endorsed an as-applied exemption from a disclosure law based on an individualized assessment of the law's tailoring as to the plaintiff's donor base—because there are none. They attempt to find support in *Bonta*, but that decision discussed narrow tailoring only in the context of the Court's facial analysis of the California reporting law at issue. *See* 594 U.S. at 615 (noting that it was "appropriate" to consider facial validity of California law because it was overbroad, *i.e.*, the "lack of tailoring to the State's investigative goals is categorical"). The Supreme Court at no point considered whether the law was "narrowly tailored" to the *Bonta* plaintiffs specifically. And the majority clarified that the dissent was *mistaken* to suggest that a facial challenge required a showing that the disclosure would expose "donors to a substantial number of organizations . . . to harassment and reprisals"; instead, plaintiffs are only "required to bear this evidentiary burden" when making an as-applied challenge to a facially constitutional law, *i.e.*, when "the challenged regime is narrowly tailored to an important government interest." *Id.* at 617.

Beyond being doctrinally incoherent, appellants' approach would defy administration; certainly appellants suggest no principles to govern individualized challenges to tailoring. *See, e.g.*, *West Virginia v. B. P. J. by Jackson*, Nos. 24–43, 24–38, 2026 WL 1868739, at *13 (U.S. June 30, 2026) (noting that "an enormous practical and administrability problem would arise if courts suddenly had to make such individualized exemptions" when applying intermediate scrutiny). Appellants' claim for as-applied relief based on tailoring rests on the assertion that AFP and AFPF have "thousands of donors" many of whom "reside outside of Delaware." AOB 42. But even accepting appellants' theory that these criteria are relevant to the application of a disclosure law, there is no principled way to draw lines between "national organizations" like appellants, AOB 43, and groups that, according to appellants, are sufficiently tied to Delaware to justify the Act's reporting requirements.[12] And the underlying argument that out-of-state donors have little or no interest in Delaware politics is demonstrably incorrect, given both Delaware's prominence as a home to corporations, and the history of out-of-state spending in Delaware elections. JA-085-86.

Appellants are effectively asking the court to make case-by-case evaluations of how much the "State has . . . [an] interest in knowing about" any particular organization's donors, AOB 42, unmoored from any judicial guidance for this analysis. Authorizing this novel challenge would confound the administration of any disclosure law like the Act and thwart the important transparency interests such laws serve; indeed, before a state could enforce its facially constitutional disclosure law, it would have to "prove" its interest in disclosure as applied to each covered group

[12] This inquiry is also entirely impracticable. Substantiating such an as-applied claim would require findings of fact about a group's specific donor base and their intentions—precisely the type of contributor information that appellants claim is protected under the First Amendment.

and each specific subset of donors subject to reporting. There is no doctrinal or other basis to take such an extraordinary step.

IV. Appellants Also Failed to Show the Non-Merits Factors Required for Preliminary Relief.

A plaintiff in a First Amendment case is not relieved of the need to satisfy "the traditional prerequisites for injunctive relief," including irreparable injury. *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). The mere "assertion of First Amendment rights does not automatically require a finding of irreparable injury," but rather, a plaintiff "must show 'a chilling effect on free expression.'" *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989). Appellants have not demonstrated that they will suffer irreparable harm if a preliminary injunction is denied as to either their facial or as-applied claims.

Unlike the plaintiff group in *DSF*, which had a track record of distributing voter guides about Delaware candidates, neither AFP nor AFPF alleged it has ever made disbursements for any type of election advocacy in Delaware, much less for communications subject to the Act. Indeed, upon filing suit, appellants had not apparently even developed any specific ads for Delaware elections—and only first produced two possible ECs for distribution with their reply brief in support of their motion for preliminary injunction. JA-323, JA-325.

Appellants thus have no current disclosure obligations under the Act. Nothing prevents them from registering a PAC or forming another association through which only those donors interested in electioneering in Delaware may finance those future ECs; appellants' reporting will be limited to those donors whose money is transferred to the PAC or association. This undertaking requires a single online form. JA-085. *See supra* at 9-10. Many third-party advertisers choose this course in Delaware, JA-087, and it strains credulity that appellants—sophisticated national groups with an existing affiliated federal PAC—would forgo this option. If instead appellants choose to embrace comprehensive donor disclosure in connection to their Delaware advocacy, any "injury" resulting from that choice would be of their own making.

The last two factors considered when reviewing a motion for preliminary injunction are whether granting such relief will "result in even greater harm to the nonmoving party" and whether "the public interest favors such relief." *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 250 (3d Cir. 2011) (citation omitted). These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Reversing the district court as appellants request would both upend Delaware's campaign disclosure system shortly before the 2026 elections and deprive voters of the information mandated by the Act—information the Supreme Court has found "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. Any potential harm to appellants would only arise if they chose not to avail themselves of the options under the Act to circumscribe donor disclosure; and, even if appellants decline to exercise these options, they have not shown any probability that their donors will be subject to harassment or reprisals—or any consequences at all—due to disclosure under the Act.

CONCLUSION

The district court should be affirmed. In the alternative, if this Court finds any error in the district court's disposition of the motion for preliminary injunction, it should remand those issues for further proceedings below.

Dated: July 29, 2026

Tara Malloy
Megan McAllen
David Kolker
Elizabeth Shimek
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200
tmalloy@campaignlegalcenter.org
mmcallen@campaignlegalcenter.org
dkolker@campaignlegalcenter.org
eshimek@campaignlegalcenter.org

/s/ Emily V. Burton
Emily V. Burton
DELAWARE DEPARTMENT OF JUSTICE
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-5374
Emily.burton@delaware.gov

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

1. The undersigned counsel for Appellants hereby certifies pursuant to L.A.R. 46.1(e) that she is a member in good standing of the bar of this Court.
2. The foregoing brief complies with complies with the requirements of Fed. R. App. P. 32(a)(7)(B) and 32(a)(5), (6), in that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font and contains 12,988 words. The text of the electronic document is identical to the paper copies.
3. Pursuant to L.A.R. 31.1(c), this electronic document was scanned for viruses using CrowdStrike Antivirus prior to filing and found to be virus free

Date: July 29, 2026

/s/ Emily V. Burton
Emily V. Burton

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2026, I electronically filed the foregoing with the Clerk of Court for the U.S. Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Emily V. Burton
Emily V. Burton